No. 87-1372

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ARGENTINE REPUBLIC,

Petitioner,

v.

AMERADA HESS SHIPPING CORPORATION AND UNITED CARRIERS, INC.

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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TABLE OF AUTHORITIES

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1. Respondents' brief in opposition to the petition for certiorari lists as their third question presented "Whether (i) admiralty jurisdiction and (ii) universal jurisdiction are present in this case" (Br. Opp., first page). That question was not decided below, is not set forth in the three questions presented in the petition or fairly included therein, and should not be considered by the Court. See this Court's Rule 21.1(a); *Berkemer v. McCarthy*, 468 U.S. 420, 443 n. 38 (1984).[1]

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[1] Respondents also seek to tender in their fourth question

2. Respondents' contention that the Alien Tort Statute, 28 U.S.C. § 1350, provides an independent jurisdictional basis for suits by aliens against foreign states for violations of international law is refuted by the Solicitor General's *amicus curiae* brief in support of the petition. We shall not burden this reply with a repetition of the Solicitor General's presentation.

Respondents have failed to advance any rational basis for their hypothesis that the 1st Congress which enacted the Alien Tort Statute was so solicitous of claims by non-resident aliens against foreign sovereigns as to constitute the then newly-established federal district courts as arbiters of such claims (Br.Opp. 12-13). This Congressional solicitude, as perceived by the respondents, is supposed to have found expression in a statute passed in an era when this young Republic sought to maintain a delicate balance in its relations with the dominant European monarchies who alone, in all likelihood, would have been the targets of private lawsuits claiming violations of the law of nations. Moreover, this extraordinary Congressional

presented the issue whether subject-matter jurisdiction over the claims asserted against the petitioner could be predicated on the tort exception contained in §1605(a)(5) of the FSIA. Their argument that "the tortious attack on the HERCULES occurred within the 'United States' " (Br.Opp. at 14) was considered and rejected by the district court (Pet. App. 30a-31a); although raised by the respondents on appeal, it was also not addressed by the court below.

Moreover, the argument is without support in law. It is settled that the tort claims exception of the FSIA applies only to torts that occur in the territory or in territorial waters of the United States. *Persinger v. Islamic Republic of Iran*, 729 F.2d 835 (D.C.Cir. 1984), *cert.denied*, 469 U.S. 881 (1984); *McKeel v. Islamic Republic of Iran*, 722 F.2d 582 (9th Cir. 1983), *cert.denied*, 469 U.S. 880 (1984).

action is supposed to have taken place at a time when the doctrine of immunity from suit of both the domestic sovereign[2] and of foreign sovereigns[3] ruled supreme. Respondents' hypothesis is untenable as a matter of history, law and logic.

Respondents' alternative argument is equally devoid of merit. They say that even if there was no remedy against a foreign sovereign under the Alien Tort Statute in 1789, the existence of such a remedy should be presumed in 1976 when the Foreign Sovereign Immunities Act ("FSIA") was enacted. This is so, they say, because the international law of state immunity had undergone dramatic changes during the past two centuries. On that premise, they urge that since there is "no mention of the Alien Tort Statute in FSIA," courts should not attribute to the 94th Congress that passed the FSIA an intention "to remove *existing remedies* in United States courts for international law violations of the type presented in this case." (Br.Opp. at 12-13; emphasis added.)

The argument fails for several reasons: first, in 1976 claims against foreign sovereigns for alleged violations of international law were not justiciable in the courts of this country and respondents cite no authority which even remotely suggests that such

[2] In the 81st Federalist, Hamilton pronounced it "inherent in the nature of sovereignty, not to be amenable to suit of an individual, *without its consent*." The Federalist No. 81, 511 (Hamilton) (B.Wright ed. 1961) (emphasis in the original).

[3] *See* 2 C. Hyde, *International Law chiefly as Interpreted and Applied by the United States* § 113 at 36 (2d ed. rev. 1945). *See also*, Vattel, *The Law of Nations*, Bk. 2, c. III, §36 (1758) (Chitty ed. 1863); *Nathan v. Virginia*, 1 Dall. (Pa.) 77 (1781); *de Moitez v. The South Carolina*, Bee 422 (Admiralty Court of Pa. 1781).

remedy existed. Indeed, there is no such authority. Second, no claim *against a foreign state* for violations of international law had *ever* been cognizable in the courts of this country or, for that matter, in any municipal court anywhere in the world. Third, there was thus no reason for Congress to refer to a non-existing remedy under the Alien Tort Statute when it completely revised the federal doctrine of foreign sovereign immunity in 1976. Fourth, in any event, Congress made it clear beyond peradventure that the FSIA was expressly designed to preempt *all other jurisdictional statutes* when it provided in § 1604 that "a foreign state *shall be immune from the jurisdiction of the courts of the United States* and of the States *except as provided in sections 1605 to 1607 of this chapter*" (emphasis added).[4]

Therefore, on the assumption that a dormant jurisdictional provision for suits against foreign sovereigns existed anywhere in the statute books—a provision which, for almost two centuries, no court, scholar or publicist had ever divined—Congress decreed in § 1604 that it should forever remain dormant.

The respondents' contention that "if Congress wishes to amend the Alien Tort Statute [to exclude suits against foreign sovereigns], it may do so, but it

[4] The only jurisdictional statute that was explicitly amended by the FSIA was the diversity statute, 28 U.S.C. § 1332. The reference to civil actions against "foreign states" in the pre-FSIA version of § 1332(a) was stricken to ensure that the FSIA became the exclusive jurisdictional predicate for suits against foreign states. *Cf.* Publ.L. 94-583, October 21, 1976, § 3, 90 Stat. 2891, with 28 U.S.C. § 41(1) (1940 ed.). *See*, H.R.Rep. No. 94-1457, at 14, *reprinted in* [1976] U.S. Code Cong. & Admin. News at 6613.

is not the province of the judiciary to rewrite the plain language of the statute" is unsupportable (Br.Opp. 13). The applicable principle is clearly to the contrary: it is not for the court below to read into the language of the Alien Tort Statute a jurisdictional predicate that never existed, and to invite Congress to rewrite the statute if it disapproved of the court's insensate interpretation.

3. In urging that certiorari be denied, respondents state that "the holding in this case rests on unique facts unlikely to recur" (Br.Opp. at 11). To demonstrate such narrow scope of the decision below, respondents point to an obscure provision in the Merchant Marine Act of 1920, 42 U.S.C. § 877, which permits foreign-flag vessels to carry merchandise between American ports and the U.S. Virgin Islands—an exception to the general prohibition against transportation of merchandise in foreign-flag vessels between points embraced within the "coastwise laws" of the United States. Under this statutory exception, the Liberian-flag tanker that was lost here could lawfully carry oil between Alaska and the U.S. Virgin Islands.

Respondents state that only recently the Commission on Merchant Marine and Defense recommended that the President consider closing the U.S. Virgin Islands "loophole" (*ibid.*); in consequence, there is a possibility that in the future foreign-flag vessels will not be permitted to carry merchandise between U.S. ports and the Virgin Islands.

But the holding below is not limited to suits against foreign states by aliens engaged in the carriage of goods between U.S. ports. The court below held broadly "that attacking a neutral ship in international

waters, without proper cause for suspicion or investigation, violates international law" (Pet.App. 7a), and that since such a violation was alleged here, "the Alien Tort Statute provides jurisdiction" (*id.*, at 10a).

The breadth of the lower court's holding belies respondents' claim that the decision below is of narrow compass. More importantly, the Solicitor General's *amicus* brief manifests to the Court that subjecting foreign states to the jurisdiction of United States courts under circumstances, as here, "could have serious adverse consequences for the Nation's foreign relations and could expose the United States to reciprocal action in the courts of other nations" (U.S. Br. *amicus curiae* at 2). The implications of the holding below are such as to necessitate review by this Court.

Therefore, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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